SYARIKAT BINA DARUL AMAN BHD & ANOR v. GOVERNMENT OF MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: WA-24C-109-10-2016]
12 MAY 2017

CONSTRUCTION LAW: *Adjudication – Setting aside – Payment claims – Claim for loss of expenses – Whether could be construed as payment claim under s. 5 of Construction Industry Payment and Adjudication Act 2012 ('CIPAA') – Whether adjudicator erred in dismissing claim in toto – Whether plaintiff an aggrieved party within meaning of s. 15 of CIPAA – Whether adjudicator had jurisdiction to revise certificate issued by Superintending Officer – Whether intervention warranted*

Vide a contract dated 23 January 2006, the defendant appointed the plaintiff as the contractor for the construction and completion of a highway for a contract sum of RM287,000,000 which was subsequently varied to the sum of RM347,070,267.53. The plaintiff awarded the construction of the whole works under the contract to Bayu Melati Sdn Bhd who, in turn, subcontracted the works to Ho Hup Construction Co Berhad. The form of contract between the parties was the PWD 203A Standard Form of Contract (Rev 10/83) which further incorporated six addenda and a 'Special Provisions of the Conditions of Contract' which itself incorporated the variation of price provision ('the contract'). Pursuant to the contract, the plaintiff had proceeded to perform the works commencing from 20 August 2005 to 28 October 2010. Upon completion of the works and *vide* a letter dated 26 January 2011, the plaintiff submitted its claim pursuant to cl. 48(a) of the contract to the defendant claiming the amount of RM22,188,726. By a letter dated 5 January 2014, the defendant informed the plaintiff that only RM137,512.95 was due and owing to the plaintiff. Dissatisfied, the plaintiff proceeded with an adjudication proceeding. The plaintiff's payment claim was for the sum of RM24,061,739.29 due to it under a final claim. The Superintending Officer ('SO') certified, by way of a final account, the sum of RM137,512.95 which had been duly paid to the plaintiff before the commencement of the adjudication. The defendant's defence was that the payments were not due under the terms of the contract and that the said claims were not in accordance with the terms of the contract and as such, the plaintiff was not entitled to each of the claims in the payment claim. The adjudicator's stand and stated position was that a 'loss and expense claim' was not a payment claim under s. 5 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') in that it was not 'a payment for work done or services rendered under the express terms of a construction

contract'. In the premises, the adjudicator dismissed the plaintiff's claim *in toto*. The adjudicator further held that the payment claim was invalid as it had not been based on what was certified by the SO which, in any event, had been paid and to entertain the plaintiff's claim, the adjudicator would have to revise the certificate issued. As that was not prayed for, the adjudicator held that he did not have the jurisdiction to do so. The plaintiff, being dissatisfied with the decision of the adjudicator, applied *vide* an originating summons for orders that the adjudicator's decision be set aside and/or declared a nullity as (i) the adjudicator had acted in excess of his jurisdiction; and (ii) there had been a denial of natural justice. The issues that arose for determination, *inter alia*, were (i) whether the plaintiff was an aggrieved party within the meaning of s. 15 of the CIPAA even though it was not required to pay any sum to the defendant; (ii) whether the adjudicator had jurisdiction to decide on the claims made in the payment claim as the plaintiff had not prayed for the certificate to be revised; and (iii) whether the 'loss and expense claims' was a valid payment claim under the CIPAA.

Held (allowing plaintiff's claim in part):

(1) An 'aggrieved party' within the context of CIPAA must be given its plain and ordinary meaning. A party is aggrieved so long as the party has been adversely affected or wrongfully deprived of its right to have its entitlement validly and justly decided pursuant to CIPAA. On the facts, the plaintiff had his whole payment claim dismissed and so was naturally an 'aggrieved party'. (paras 28 & 29)

(2) 'An aggrieved party' is not necessarily 'a party against whom an adjudication decision was made'. While it would certainly include such a party, it is broad enough to cover a party that is dissatisfied with the adjudication decision either because its whole payment claim has been dismissed or that it was only given a part of several heads of claim or that it was given a sum less than what was claimed in its payment claim. (para 31)

(3) The powers under s. 25 are vast powers granted to an adjudicator so that he could decide on a dispute effectively and efficiently. Before an adjudicator could exercise any of the powers given to him under s. 25, an adjudicator must first have the jurisdiction to hear the dispute under s. 27. Once the adjudicator has the jurisdiction, it was then within his powers to be exercised at his discretion, to decide on whether the plaintiff was entitled to the whole or part of its claims based on the evidence adduced. There was nothing to state that he could only exercise his powers upon request of the parties either in their payment claim as in this case when there was no prayer for the certificate to be reviewed or revised. (para 48)

(4) Whether the adjudicator decides on the amount owing by way of reviewing or revising the certificate is a matter left to him in the exercise of his powers under s. 25(m) of the CIPAA. To say that the adjudicator had no jurisdiction to decide on the payment claim because the plaintiff had not asked him to review and revise the certification of the SO would be to take an unduly narrow and restrictive view of the jurisdiction conferred on him to decide on the plaintiff's payment claim. (para 52)

(5) Having made an observation that the loss and expense claim was not a valid payment claim to be pursued in this adjudication proceedings and despite not making a finding on the 'Loss and Expense Claims', the adjudicator should have struck out the claim under the head of the payment claim. To dismiss this head of the payment claim would mean that the merits had been considered and found wanting, resulting in a dismissal of the claim. (paras 66 & 64)

(6) There was no good reason why payments pertaining to 'loss and expense claims' due to the delay in completion of works could not come within the ambit of the CIPAA. Quite obviously the payment claim for this loss and expense was made because the contract was still subsisting and there were further claims due after the suspension of work because of further works done. It also flowed naturally from s. 29(4)(b) of the CIPAA where the party who exercised his right under s. 29(3) of the CIPAA was entitled to a fair and reasonable extension of time to complete his obligations under the contract. (paras 84 & 86)

(7) As the adjudicator had erroneously held that he had no jurisdiction under the CIPAA to hear the payment claim, this court was at liberty to interfere with the decision made as it was a decision that went towards jurisdiction. Not to hear a dispute submitted for his adjudication was equally a breach of natural justice, for the adjudicator did not hear the parties at all. As this head of claim for 'loss and expense claims' was severable from the other heads of claim which had been decided on merits, this part of the decision with respect to the 'loss and expense claims' was set aside. The plaintiff should be entitled to re-commence adjudication proceedings with respect to the 'loss and expense claims' with a new adjudicator. (paras 87, 88, 89 & 90)

Case(s) referred to:

Cantillon Ltd v. Urvasco Ltd [2008] 117 Con LR 1 ***(refd)***

Chip Hup Hup Kee Construction Pte Ltd v. Ssangyong Engineering & Construction Co Ltd [2009] SGHC 237 ***(refd)***

Enterprise Managed Services Ltd v. Tony McFadden Utilities Ltd [2010] BLR 89 ***(refd)***

George Developments Ltd v. Canam Construction Ltd [2006] 1 NZLR 177 ***(refd)***

Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317 FC ***(refd)***

A *Parist Holdings Pty Ltd v. Wt Partnership Australia Pty Ltd [2003] NSWSC 365* ***(refd)***
Pilon Ltd v. Breyer Group Plc [2010] EWHC 837 ***(refd)***
Punca Klasik Sdn Bhd v. Abdul Aziz Abdul Hamid & Ors [1994] 1 CLJ 403 HC ***(refd)***
Vaultrise Ltd v. Paul Cook [2004] Adj.C.S. 04/06 ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(refd)***

B **Legislation referred to:**
Construction Industry Payment and Adjudication Act 2012, ss. 4, 5, 6, 8(3), 15, 25(b), (m), (n), (p), 27(1), 28(1), 29(1), (3), (4)(b), (c), 30(1)
Legal Profession Act 1976, s. 103E

Construction Contracts Act 2002 [NZ], s. 19

C **Other source(s) referred to:**
Lam Wai Loon & Ivan Loo, *Construction Adjudication in Malaysia,* p 212
Lim Chong Fong, *The Malaysian PWD Form of Construction Contract,* p 111

For the plaintiff - James Monteiro, K Kirubakaran & Suren Rajah; M/s James Monteiro
For the defendant - Chandra Devi Letchuman & Firdaus Jamaludin SFCs; AG's Chambers

D *Reported by Sandra Gabriel*

JUDGMENT

Lee Swee Seng J:

E **[1]** The plaintiff here is the claimant in the adjudication under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). The plaintiff here had commenced adjudication against the defendant who was the respondent in the adjudication.

Project

F **[2]** The parties had entered into a contract in writing dated 23 January 2006, wherein the defendant appointed the plaintiff as the contractor for the construction and completion of Trans Eastern Kedah Interland Highway, from Durian Burung to Kupang Kedah (Package A) ("the project") in Kedah for a contract sum of RM287,000,000 which was subsequently varied
G bringing the total contract sum to RM347,070,267.53.

[3] The plaintiff subsequently awarded the construction of the whole works under the contract to Bayu Melati Sdn Bhd ("Bayu Melati") who in turn subcontracted the Works to Ho Hup Construction Co Berhad ("Ho Hup"). The plaintiff stated that at all material times, the defendant was aware
H of the sub-contract arrangement between the plaintiff, Bayu Melati and Ho Hup. Nothing really turns in this subcontracting though it might explain the nature of some of the documents produced by the claimant to substantiate its loss and expense claim in its payment claim.

I

[4] The form of contract between the parties is the PWD 203A Standard Form of Contract (Rev 10/83) which further incorporates six addenda and a "Special Provisions of the Conditions of Contract" which itself incorporates the variation of price ("VOP") provision ("the contract"). A

[5] Pursuant the contract, the plaintiff had proceeded to perform the works commencing in August 2005. The plaintiff was granted five extensions of time for reasons beyond its control, extending the contract commencement date of 20 August 2005 to 28 October 2010. B

Problem

[6] Upon completion of the works and *vide* a letter dated 26 January 2011, the plaintiff submitted its claim pursuant to cl. 48(a) of the Contract to the defendant claiming the amount of RM22,188,726. C

[7] The defendant and PJS Consultants Sdn Bhd ("PJS"), the defendant's engineering consultant, requested the plaintiff to supply the defendant with the supporting documents to substantiate its claim pursuant to cl. 48(a) of the Contract. D

[8] There was a long waiting period after that and it was only by a letter dated 5 January 2014 that the defendant informed the plaintiff that they had made a decision that only RM137,512.95 was due and owing to the plaintiff. The plaintiff was unhappy with the amount claimed and the paltry amount approved by the defendant and so it asked *vide* its letter of 13 January 2014 to provide details of the amount approved and the reasons and supporting evidence as to why the amount it claimed was not approved. The defendant replied by its letter of 30 January 2014 stating that they were unable to provide details regarding the defendant's decision as it was confidential. E F

[9] The plaintiff as claimant proceeded with adjudication. The plaintiff's payment claim was for the sum of RM24,061,739.29 due to it under a final claim. The Superintending Officer (SO) only certified by way of a final account the sum of RM137,512.95 which certified sum had been duly paid to the claimant before the commencement of the adjudication. G

[10] The respondent's defence as set out in the payment response was that the payments were not due under the terms of the contract and that the said claims were not in accordance with the terms of the contract and as such the respondent stated that the claimant was not entitled to each of the claims in the payment claim. H

Prayers

[11] The parties shall be referred to as claimant and respondent as they appeared in the adjudication. I

[12] The adjudicator dismissed the whole of the claimant' claim. The claimant, being dissatisfied with the adjudication decision, has applied by this originating summons for the following orders:

a) The adjudication decision be set aside and/or declared a nullity as:

i) the adjudicator has acted in excess of his jurisdiction; and

ii) there has been a denial of natural justice.

b) The plaintiff be entitled to re-commence adjudication proceedings from the notice of adjudication dated 25 March 2016 with a new adjudicator to be appointed by the Director of KLRCA;

c) The defendant pay the costs and expense of this application;

d) Such further and other reliefs as this honourable court deems fit.

[13] Unlike most applications before this court for setting aside of an adjudication decision that are normally made by the respondent who has to pay the sum stated in the decision, here there is no such application because the respondent was not made to pay any sum to the claimant. Likewise unlike most applications for enforcement of an adjudication decision that would be made by a successful claimant, here there is none because the whole of the claimant's payment claim was dismissed.

[14] What we have is peculiarly the claimant's application to set aside the whole of the decision which it said it is an "aggrieved party" within the meaning of s. 15 CIPAA even though it was not required to pay any sum to the respondent.

Proceedings In The Adjudication

[15] The payment claim served by the claimant on the respondent under s. 5 of the CIPAA was for the sum of RM24,061,739.29, particulars of which are as follows:

Description of Work/Services	Amount
(1) Total Contract Sum	
(a) Original Contract Sum	RM287,000,000.00
(b) Total Variation confirmed/ approved	RM60,070,267.53
Total	**RM 347,070,267.53**

Works Claimed	Amount Due
(1) Total works claimed for Variation of Price (VOP) for Diesel.	RM9,225,107.92
(2) Total works claimed for Excess Gunite Thickness	RM4,001,496.59
(3) Total works claimed for Geotechnical Work	RM2,511,999.60
(4) Total works claimed for Loss & Expense pursuant to Extension of Time of 25 months from 1.3.2008 to 30.3.2010	RM8,323,135.18
Total Due Amount	**RM24,061,739.29**

[16] The respondent served its payment response dated 21 March 2016 on the claimant denying all the claims put forward by the claimant on grounds that the said claims were not in accordance with the terms of the contract and as such the respondent stated that the claimant was not entitled to each of the claims in the payment claim.

[17] The plaintiff served its adjudication notice on the defendant on 25 March 2016, and consequently on 22 April 2016, the Kuala Lumpur Centre for Arbitration ("KLRCA") appointed an adjudicator for the dispute. The claimant followed up with the service of the adjudication claim and the respondent with the service of its adjudication response. An adjudication reply was also filed by the claimant.

[18] The claimant subsequently withdrew its claim for VOP for diesel in the sum of RM9,225,107.92, reserving its right to pursue this head of claim against the respondent in arbitration proceedings instead.

[19] Pursuant to the directions given by the adjudicator, both parties filed their respective written submissions with authorities on 24 June 2016. The claimant subsequently filed its written submissions in reply on 29 June 2016 while the defendant did not file any written submissions in reply.

[20] The adjudicator rendered his decision on 8 August 2016 ("the adjudication decision"), dismissing the claimant's entire claim with cost awarded to the respondent. The adjudicator held that the payment claim was invalid as it had not been based on what was certified by the SO which in any event had been paid and that to entertain the claimant's claim he would have to revise the certificate issued and as that was not prayed for, he does not have the jurisdiction to do so.

[21] He further stated that with respect to claim No. 2 and No. 3, based on the evidence adduced through the documents, the claimant had not proved its claim. As for claim No. 4 the adjudicator held that a claim for "loss and expense" is outside the purview of CIPAA and that he has no jurisdiction to adjudicate on the claim.

Principles

Whether The Claimant Whose Payment Claim Was Disallowed By The Adjudicator Is An Aggrieved Party Under s. 15 CIPAA

[22] Under s. 15 CIPAA, only an aggrieved party may apply to the High Court to set aside an adjudication decision. The question is "Who is an aggrieved party?"

[23] Generally it is the respondent who is required to make a payment to the claimant under an adjudication where the unpaid party is claiming against a non-paying party, in a case where the claimant is the successful party. In such a case the aggrieved party who may apply to set aside the adjudication decision is the respondent who is required to make payment to the claimant.

[24] In the case where the claimant is successful only in part or for far less than what it claims, or as here, where the whole of its claim is dismissed, is the claimant then an aggrieved party even though it is not required to make any payment to the respondent/non-paying party?

[25] I would give a broad meaning to the words "aggrieved party" consistent with what the Court of Appeal held in *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* [1997] 3 CLJ 854 at p. 868; [1997] 2 MLJ 487 para. F of p. 499:

> To my mind, the word 'aggrieved' must be given its ordinary meaning. **To be aggrieved means one is dissatisfied with or adversely affected by** a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category is never closed. (emphasis added)

[26] The claimant further referred to the Federal Court case of *Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor* [2008] 4 CLJ 317; [2008] MLJU 226, a case involving a party's right to appeal within s. 103E of the Legal Profession Act 1976, where the Federal Court in considering the definition of party aggrieved took guidance from the English courts and *inter alia* held at pp. 2 and 3 as follows:

> The position in England has now changed. As Drost J observed in *College of Dental Surgeons v. Findlay* [2000] BCTC Lexis 1574:
>
> > However, the law of England has changed since then. That narrow interpretation of a 'person aggrieved' is no longer accepted. The tide began to turn with the judgment of Lord Denning in *Attorney General of the Gambia v. N'Jie* [1961] 2 All ER 504, where, at p 511, he said:

> *The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation.* They do not include, of course, a mere busy body who is interfering in things which do not concern him; but they do *include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.* (emphasis added)

[27] In *Punca Klasik Sdn Bhd v. Abdul Aziz Abdul Hamid & Ors* [1994] 1 CLJ 403 at p. 406; [1994] 1 MLJ 136 para. B of p. 142, His Lordship James Foong J (later FCJ) with regard to interpretation of a statutory instrument held:

> A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

[28] I agree with the claimant that an "aggrieved party" within the context of CIPAA must be given its plain and ordinary meaning, that is to say a party is aggrieved so long as the party has been adversely affected or wrongfully deprived of its right to have its entitlement validly and justly decided pursuant to CIPAA.

[29] Here the claimant had his whole payment claim dismissed and so is naturally an "aggrieved party". If Parliament had intended only "the party against whom the adjudication decision is made" to be the only party who could set aside an adjudication decision, it could expressly have used that expression which was used in s. 30(1) CIPAA with respect to "Direct Payment from Principal".

[30] If Parliament had wanted to confine "the party who obtained an adjudication decision in his favour" as the party who could enforce the adjudication decision, it would also have stated so as such an expression was used in s. 30(1) CIPAA which is reproduced below:

> 30. Direct Payment from Principal
>
> (1) If **a party against whom an adjudication decision was made** fails to make payment of the adjudicated amount, **the party who obtained the adjudication decision in his favour** may make a written request for payment of the adjudicated amount direct from the principal of the party against whom the adjudication decision is made. (emphasis added)

[31] The Legislature must have intended a different meaning when different words are used in the same statute; otherwise the same words would be used for consistency of expression. One can surmise that "an aggrieved party" is not necessarily "a party against whom an adjudication decision was made." While it would certainly include such a party, it is broad enough to cover a party that is dissatisfied with the adjudication decision either because its whole payment claim has been dismissed or that it was only given a part of several heads of claim or that it was given a sum less than what was claimed in its payment claim.

[32] It would of course be a case where the "aggrieved party" would have to set aside the whole of the decision in its favour if it is minded to apply to set aside the decision unless it is a case where the heads of claim without jurisdiction can be severed from those that are within jurisdiction in which instance, only so much of the claim that is erroneously excluded as being without jurisdiction needs to be set aside.

[33] In a case where it is not severable, then it would be very difficult if not impossible to set aside part of the decision on ground of excess of jurisdiction or breach of natural justice for generally the whole of the decision would then have to be set aside.

[34] Presumably a claimant who got much less than what was claimed in the payment claim would have to set aside the whole of that decision if it can be shown that the decision was procured through fraud or bribery.

[35] It is generally understood that in an adjudication under CIPAA, the worst that an unpaid party/claimant may suffer is to have its whole payment claim dismissed and costs awarded against it and it would not be a case where the claimant has to end up paying the respondent/non-paying party other than costs.

[36] Conversely under s. 28(1) CIPAA it is not necessarily a "party who obtained the adjudication decision in its favour" that is entitled to enforce an adjudication decision though it would certainly include such a party. It may well include a respondent to whom costs has been awarded and for which payment had not been made by the claimant.

[37] All said, a claimant whose payment claim has been dismissed is certainly a party who is aggrieved with the decision and in applying to set aside the decision, the court may be minded to only set aside that part of the decision that was made when the adjudicator erroneously declined jurisdiction on ground that the payment claim is not a payment claim within the meaning of CIPAA.

Whether The Adjudicator Has Jurisdiction To Decide On The Claims Made In The Payment Claim As The Claimant Had Not Prayed For The Certificate To Be Revised

[38] The three claims of the claimant are set out in the payment claim and the respondent in its payment response had disputed and denied the whole of the payment claim on ground that the claims are not due under the terms of the contract and not in accordance with the terms of the contract.

[39] The matters raised in the payment claim and payment response under ss. 5 and 6 respectively of CIPAA would confer and confine the jurisdiction of the adjudicator to matters raised there as stated in s. 27(1) CIPAA.

[40] The adjudicator therefore has the jurisdiction to proceed to hear the matters raised there by considering the evidence adduced in the documents tendered. There was no oral hearings requested by the parties and in any event, the adjudicator had in his decision stated that there was no real need for an oral hearing.

[41] The adjudicator had initially proceeded on a narrow sense of his jurisdiction by stating that since it was not specifically pleaded by the claimant that he should exercise his powers under s. 25(m) to review and revise the certificate issued by the SO, then he has no jurisdiction to decide on the claims of the claimant.

[42] In dealing with the issue on whether the plaintiff was entitled to seek a revision of the final certificate, the adjudicator made the following observations:

At para. 113 of the adjudication decision

> In any event, the Plaintiff did not seek for any remedy in its Adjudication Claim for a revision of the Final Certificate. It is not open to me to revise the Final Certificate on my own volition. That would be an excess of jurisdiction. (emphasis added)

At para. 118 of the adjudication decision

> It must be borne in mind that an Adjudicator does not step into the shoes of the certifier named in the contract. (emphasis added)

At para. 123 of the adjudication decision

> If the Plaintiff is unhappy with the alleged under certification of its Final Claim, then it should invoke the arbitration clause in the Contract to refer the alleged under certification to arbitration. CIPAA is **not the proper course** for this. (emphasis added)

[43] Learned counsel for the claimant submitted that the adjudicator had taken an erroneously restrictive view of his own jurisdiction under s. 25 CIPAA by deciding not to review or revise the final certificate. The claimant further argued that the adjudicator has misconstrued his powers under s. 25(m) CIPAA which states:

> Section 25(m)
>
> Review and revise any certificate issued or to be issued pursuant to a construction work contract, Decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute.

[44] In interpreting s. 25(m) CIPAA, learned counsel for the claimant referred to the guidance laid down in the book *Construction Adjudication in Malaysia* by Lam Wai Loon and Ivan Loo at p. 212 where the learned authors had commented on s. 25(m) CIPAA as follows:

A Pursuant to section 25(m) of CIPA Act 2012, the Adjudicator has the power **to review and revise any certificate issued or to be issued pursuant to a construction contract,** decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute referred to him, which he considers erroneous. **With this power, the Adjudicator is effectively put in the position of the certifier** or the decision maker or the
B person who possesses the power under the construction contract to issue instructions, provide opinions or conduct valuations relating to the subject matter of the Adjudication. (emphasis added)

[45] The claimant further referred to the case of *Vaultrise Ltd v. Paul Cook* [2004] Adj.C.S. 04/06, where the court held as follows:

C … that an **adjudicator can consider whether or not a certificate should have been issued and if a missing certificate was due he could determine the sum.** The adjudicator had found that a final certificate should have been issued on or before the 30th July. He went on to determine the amount and held that that sum was due. **There was no reason why a**
D **dispute in those terms, *viz* whether or not a certificate should be issued** and if so what it should contain, **should not be referred to adjudication.** (emphasis added)

[46] By the same token, an adjudicator may declare and decide how much is properly due under a correct certificate if the certificate issued is an under-
E certification or over-certification.

[47] I derived some comfort from the observation made in *Cantillon Ltd v. Urvasco Ltd* [2008] 117 Con LR 1:

F [67] ... As the authorities established that the responding party can put forward any arguable defence in adjudication, ... it must follow that the adjudicator can rule not only on that defence but **also upon the ramifications of that defence to the extent that it is successful in so far as it impacts upon the fundamental dispute.** (emphasis added)

[48] The powers under s. 25 are vast powers granted to an adjudicator so that he can decide on a dispute effectively and efficiently. Before he can
G exercise any of the powers given to him under s. 25, he must first have the jurisdiction to hear the dispute under s. 27. Once he has the jurisdiction, it is then within his powers to be exercised at his discretion, to decide on whether the claimant is entitled to the whole or part of its claims based on the evidence adduced. There is nothing to state that he can only exercise his
H powers upon request of the parties either in their payment claim as in this case when there was no prayer for the certificate to be reviewed or revised. For instance his power under s. 25(b) to order the discovery and production of documents need not be premised upon an application by a party but that he may on his own initiative do so consistent with his powers under s. 25(i)
I to inquisitorially take the initiative to ascertain the facts and the law required for the decision.

[49] So too if he should decide that there should be an oral hearing and order that any evidence be given on oath under s. 25(1). In as much as he could under s. 25(n) CIPAA decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter, I would say that he has the power to decide how much is due to the claimant even if a certificate has been issued which the claimant felt is an under-certification and more so here when there is no breakdown as to what the sum of RM137,512.95 consists of.

[50] The fact that he has the power to review and revise any certificate issued would mean that if in the process of finding a higher sum is due than what is stated in the certificate, he is of course at liberty to review and revise the certificate. Such vast powers are granted to him when parties have given him the jurisdiction to decide on the dispute; the claimant stating a certain sum is due and the reasons for it and the respondent stating nothing is due as anything due under the certificate has been paid already.

[51] Here was a case where the claimant had submitted the original claims on 26 January 2011 and no reply was forthcoming from the respondent until 5 January 2014. Basically the adjudicator would have to decide whether the various sums claimed under the various heads of claim are due and if so, how much.

[52] Whether the adjudicator decides on the amount owing by way of reviewing or revising the certificate is a matter left to him in the exercise of his powers under s. 25(m) CIPAA. To say that he has no jurisdiction to decide on the payment claim because the claimant had not asked him to review and revise the certification of the SO would be to take an unduly narrow and restrictive view of jurisdiction conferred on him to decide on the claimant's payment claim.

[53] Bearing in mind that a lot of payment claims are drafted by the parties themselves at that stage and even at the adjudication proceedings the parties are allowed to represent themselves as provided for under s. 8(3) CIPAA, it behooves upon the court not to take an unduly technical and legalistic approach to procedural niceties.

[54] In support of the claimant's contention, the claimant relied on the Singapore High Court case of *Chip Hup Hup Kee Construction Pte Ltd v. Ssangyong Engineering & Construction Co Ltd* [2009] SGHC 237, where Judith Prakash J (now JA) made the following observations:

> … the respondent had been advised that the Determination ought to be set aside on the ground that the Adjudicator had no jurisdiction to adjudicate on the application because:
>
> (a) The claimant had failed to serve on the respondent a valid payment claim under the SOP Act …

A … The claimant, apart from making substantive arguments in reply to the respondent, also raised the issue of whether the respondent was entitled to challenge the Determination by disputing the validity of the payment claim and/or the adjudicator's jurisdiction when these questions had not been previously raised in either the adjudication proceedings or before
B the AR. As this was a preliminary issue I had to consider it first before proceeding to the substantive issues …

… The claimant, in responding to the respondent's arguments, drew to my attention various steps that the respondent had taken in the prior proceedings before the adjudicator and the
C AR. These were:

(a) Payment Certificate No 5 and the Adjudication Response did not dispute the validity of Progress Claim 5 (the respondent's argument that Progress Claim 5 was an invalid document was the basis of its contention that the Adjudicator had no
D jurisdiction);

(b) In the adjudication proceedings, the respondent had proceeded on the basis that Progress Claim 5 was valid and the Adjudicator had jurisdiction to adjudicate the matter;

(c) *The respondent did not dispute the validity of the Payment Claim or the*
E *jurisdiction of the Adjudicator*;

(d) The respondent had specifically raised the issue of whether the Adjudicator could proceed with the adjudication in view of the fact that the contract between the parties had been terminated and by this submission, the respondent had accepted that, apart from determination of the contract, the Adjudicator did have
F jurisdiction

… The claimant paid particular attention to the positions taken by the respondent in the first affidavit of Ahn Kook Jin which was filed in support of SUM 3242. It asserted that the respondent had taken the following positions in the same:
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(a) It acknowledged that the claimant had served its payment claim dated 20 April 2008, which was the subject of the adjudication;

(b) It acknowledged the validity of the payment claim in conceding that it had to serve a payment response to the claimant's payment claim, and explained that its delay in doing so was
H simply due to "other pressing issues" …

[55] Based on the above, Her Ladyship Judith Prakash J (now JCA) concluded at para. 32 by stating:

I was satisfied on the above facts that the actions of the respondent both
I before the Adjudicator and before the AR were sufficient to establish a waiver of its right to challenge the Adjudicator's jurisdiction. This was because the facts subsequently raised by the respondent to challenge the jurisdiction (ie the alleged inadequacy of Progress Claim 5) must have

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been known to the respondent and its legal advisers if not at the time Progress Claim 5 was served then shortly thereafter. The question that I had to consider was whether such facts could be relied on in law to constitute a waiver.

[56] In coming to his conclusion, Her Ladyship Judith Prakash J (now JCA) had made reference to the Australian case of *Parist Holdings Pty Ltd v. Wt Partnership Australia Pty Ltd* [2003] NSWSC 365 where she made the following observations:

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In *Parist*, the defendant sought a declaration that the plaintiff must pay to it an adjudicated amount determined by an adjudicator in adjudication proceedings under the NSW Act. The plaintiff contended, inter alia, that the adjudicator had acted ultra vires in carrying out the adjudication and in making the determination and that therefore, the determination was a nullity. One ground of its argument was that the defendant's payment claim was invalid because it did not comply with the requirements of the relevant statutory provisions. The plaintiff submitted that as a consequence of the invalidity of the payment claim, the initiation and conduct of the statutory adjudication process was fatally flawed so as to deprive the adjudicator of jurisdiction to determine the amount to be paid. The plaintiff, however, **had not put in issue the validity of the statutory payment claim when it appeared before the adjudicator. It only raised this issue when it filed its summons in the subsequent court proceedings.**

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The court held that because **the plaintiff had not raised the issue of jurisdiction earlier and had instead participated in the adjudication process, it was no longer entitled to make this argument** ... (emphasis added)

[57] I find merit in the claimant's submission that it is only now that the respondent has raised these issues and has enthusiastically agreed with the position taken by the adjudicator. If the respondent had wanted to raise the validity of the payment claim on ground that the claims are premature or that for some reasons the payment due dates are wrong, it must be specifically pleaded and argued in the submissions.

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[58] However, to be fair to the adjudicator, he proceeded on an abundance of caution and continued to determine the merits of the claimant's payment claim for claims no. 2 and 3. At para 126 of the decision he stated this cautious approach as follows:

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Assuming that I was wrong in my finding that the Payment Claim is invalid, what would be my findings on the existing 3 heads of claim if the Claimant has satisfied the requirements of section 5? I will deal with them in the order that the Claimant has done in its Adjudication Reply ...

[59] At paras. 133-136 of the decision, the adjudicator made a finding on claim No. 3 on geotechnical works as follows:

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133. Having examined the relevant clauses in the Contract, I agree with the Respondent's contention that the Claim under this head is based on erroneous clause under the Contract.

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> 134. It is also my finding that since the Claimant had signed the PHK No. 2 and PHK No. 14 (Certificate of Adjustment of Contract Sum) valuation pertaining to the slope works, **it is reasonable to infer that the Claimant had agreed with the calculation by the Respondent pertaining to the slope works.** As to the Claimant's contention that it had signed the 2 documents merely as acknowledgment, I find it hard to believe because the signatures on the said documents is not by a junior person like a clerk of the Claimant but that of the Group Managing Director. Accordingly, I find that the Claimant has waived its claim under Claim No. 3.
>
> 135. However, I make no finding as to the allegations whether the slope failures were caused by the Respondent's design failure or the poor workmanship of the Claimant. This is beyond the jurisdiction of the Adjudicator.
>
> 136. Hence, it is my finding that **the Claimant has failed to prove I its entitlement to payment under Claim No. 3**. (emphasis added)

[60] The adjudicator having made a finding of mixed fact and law, it is not for this court to interfere on merits. This is not an appeal and the adjudicator having applied his mind to the clauses before him and the documents, have come to a decision which he is entitled to. It is a decision of temporary finality and it will be overtaken by the award in the arbitration if the claimant in the arbitration to be commenced is able to persuade the arbitrator that the adjudicator had made a wrong finding of mixed law and fact. It is not for this court to enter into the realm of sufficiency of evidence with respect to the findings arrived at unless there is clear evidence of a lack of independence or impartiality which is not the ground relied on by the claimant to set aside the decision. There is also no evidence of a breach of natural justice in the adjudicator arriving at his decision to dismiss this head of claim for he heard both sides before arriving at his decision.

[61] So too with respect to claim no. 2 on excess guniting works. The adjudicator had made a finding of mixed law and fact when he held as follows:

> 138. ... the Claimant has failed to prove the total slope area where the gunite thickness was more than 100 mm thick. The Claimant cannot claim for the total area where the gunite is more than 100 mm thick by using the average depth covering the area to prove the total area where the guniting exceeded the 100 mm thickness. In addition, the Claimant had signed the PHK No. 2 and PHK No. 14 (Certificate of Adjustment of Contract Sum) valuation pertaining to the slope works. The Claimant's is estopped from claiming the said item again.

[62] Again for the reasons given above, I would not disturb this finding of mixed law and fact as to do so would be descending into the merits of the decision. As what was decided here is not in excess of jurisdiction or in breach of natural justice, this head of claim must remain intact until it is overtaken by an arbitral award.

Whether The "Loss And Expense Claims" Is A Valid Payment Claim Under CIPAA

[63] This is the main plank of the claimant's complaint on the decision of the adjudicator. I note that the adjudicator had stated that "loss and expense claim" is not a valid claim to be initiated under the CIPAA where he made the following comments at paras. 130-131 of the adjudication decision:

> 130. ... **Evaluating a loss and expense claim is a very tedious exercise which requires some expertise. It cannot be done within the short timelines given in CIPAA.** In fact, in our present case the claim has been evaluated by the S.O. and certified for payment. It is just that the Plaintiff is dissatisfied with the assessment and wants the Tribunal to reopen the matter, which I am not prepared to do.
>
> 131. Accordingly, it is my finding that the loss and expense claim **is not a valid payment claim to be pursued in this adjudication proceedings.** I will **refrain from expressing any views** on the merit of the said claim since the Plaintiff may still want to refer the matter to arbitration. (emphasis added)

[64] Having made such an observation and despite not making a finding on the "loss and expense claims", the adjudicator at para. 139 of the decision stated:

> In the premises, I have no choice but to dismiss the Plaintiff's claim *in toto*. I also struck out the Plaintiff's Claim No.1 as it had been withdrawn by the Plaintiff.

[65] The claimant submitted that based on the foregoing reasons, the adjudicator had acted in excess of his jurisdiction by dismissing the plaintiff's claim in its entirety despite concluding he had no jurisdiction to decide the matter.

[66] I agree that the adjudicator should have struck out the claim under this head of the payment claim. To dismiss this head of the payment claim would mean that the merits had been considered and found wanting, resulting in a dismissal of the claim.

[67] However what is more important is not the nomenclature but the nub of the issue which is whether a "loss and expense claim" in this contract is claimable as a payment claim.

[68] The adjudicator's stand and stated position was that a "loss and expense claim" is not a payment claim under s. 5 CIPAA in that it is not "a payment for work done or services rendered under the express terms of a construction contract" as "payment" is defined in s. 4 CIPAA.

[69] My attention was drawn to the fact that the adjudicator had, at para. 97 of the adjudication decision, made the following observation:

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> No oral hearings were conducted nor was there any request from the parties for me to hold an oral hearing. In any event, in light of the nature and complexity of the disputes raised by the parties, it would not have been practical to conduct a viva voce hearing within the tight time frame stipulated under section 12 of CIPAA 2012.

B **[70]** A refusal to assume jurisdiction and decide on the matter submitted to it on the erroneous understanding of his lack of jurisdiction would be equally a breach of natural justice in that the claimant's claim, in this case, under claim no. 4 for "loss and expense claim" was not heard at all when it has been properly submitted for adjudication.

C **[71]** As authority for this proposition, the claimant referred this court to the case of *Pilon Ltd v. Breyer Group Plc* [2010] EWHC 837 (TCC) where the court held at para. 17 of the judgment as follows:

> An Adjudicator can make an inadvertent mistake when answering the question put to him, and that mistake will not ordinarily affect the
D enforcement of his Decision: see *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd* [2000] BLR 49. If, on the other hand, he considers and purports to decide an issue which is outside his jurisdiction, then his decision will not be enforced: see the discussion in *Sindall Ltd v. Solland* [2001] 3 TCLR 712. But there is a **third category,** which is where the adjudicator **takes an erroneously restrictive view of his own jurisdiction,** with the result that
E **he decides not to consider an important element of the dispute** that has been referred to him. This **failure is usually categorised as a breach of natural justice.** (emphasis added)

[72] At para. 22 of the judgment, the court stated that when an adjudicator erroneously takes a restrictive view of his own jurisdiction, it is tantamount
F to a breach of natural justice:

> As a matter of principle, therefore, it seems to me that the law on this topic can be summarised as follows:
>
> 22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-
G issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion v. Devonport*.
>
> 22.2 If the **adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his**
H **jurisdiction** (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast, Broadwell, and Thermal Energy*.

I

> 22.3 However, for that result to obtain, **the adjudicator's failure must be deliberate**. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the Decision unenforceable: see *Bouygues and Amec v. TWUL*.
>
> 22.4 It goes without saying that any **such failure must also be material:** see *Cantillon v. Urvasco* and *CJP Builders Limited v. William Verry Limited* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a **potentially significant effect on the overall result of the adjudication:**
>
> see *Keir Regional Ltd v. City and General (Holborn) Ltd* [2006] EWHC 848 (TCC).
>
> 22.5 A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. That was plainly a factor which, in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party.
>
> (emphasis added)

[73] On the issue of time constraint as highlighted by the adjudicator in the adjudication decision, I agree with the claimant's submission that if the circumstances render it impossible for the adjudicator to fairly and properly arrive at a conclusion within the permitted time period for making the decision, he ought to have exercised his powers under s. 25(p) CIPAA to extend the time period as reasonably required or in the alternative, resign as an adjudicator pursuant to s. 17(4) CIPAA. However, in the present case, the adjudicator had failed to do both and had gone on to make the following observations:

> At para. 124 of the adjudication decision
>
> > Furthermore, I do not think the nature and quantum of the claims is a suitable one to be dealt with under the provisions of CIPAA. I am not prepared to nor do I think it is fair for me to carry out a revaluation of the Final Claim within the tight timelines provided in CIPAA. It would not be fair to the parties. I believe the Act does not require me to reach a Decision if unable to do so within the time limits imposed by the section.

[74] I further agree with the claimant that the adjudicator must always have in the forefront of his mind the intent and objective of CIPAA which is to provide a mechanism for speedy dispute resolution through adjudication. The *dicta* of Coulson J in the case of *Enterprise Managed Services Ltd v. Tony McFadden Utilities Ltd* [2010] BLR 89, at para. 93 of the judgment is instructive to all adjudicators faced with a seemingly tedious task:

A In such circumstances, *where the sheer volume/size of a claim may make it unmanageable in an adjudication,* the course to be adopted by the adjudicator is clear. As the same judge explained in *CIB Properties Limited v. Birse Construction Limited* [2004] EWHC 2365 (TCC), *the adjudicator has to decide at the outset whether or not he can discharge his duty to reach a decision impartially and fairly within the time limit prescribed by the Act. If he cannot, he ought to resign.*
B Thus, at the outset, the adjudicator, Mr. Robert Shawyer of Always Associates, had to ask himself that question. In arriving at the answer, he was of course entitled to assistance from the parties. (emphasis added)

[75] At para. 99 of the judgment, Coulson J continued as follows:

C In my judgment, the adjudicator *ought to have taken more of a grip on this adjudication at the start, and reached early views both as to jurisdiction and as to whether it could be dealt with fairly in the time period.* Had he done so, I think it likely that for one, or maybe even both, of these reasons he would have concluded *that the adjudication could not be properly or fairly progressed and that the right course was resignation.* That would have *obviously saved a good deal*
D *of time and money,* not least the costs of these Part 8 proceedings which, as I understand it, are now put at the barely credible figure of £240,000. The fact that, as a matter of practicality and fairness, this claim was not suitable for the summary adjudication process only supports my conclusion that the reference to adjudication was inappropriate as a matter of law. (emphasis added)

E **[76]** I appreciate that whilst a "loss and expense claim" may in some instances be a claim for special damages arising out of breach by the principal, there are cases where contractually such a claim is allowed to be "added to the contract sum" or as in some cases like the present PWD 203A standard form of contract it is to be claimed under a final account and hence
F payable as part of the amount claimable for the additional costs incurred for work done.

[77] The learned author Lim Chong Fong (now Justice Lim Chong Fong) in his book entitled *The Malaysian PWD Form of Construction Contract,* at p. 111 observed as follows:

G As soon as is practicable but not later than ninety (90) days after practical completion of the Works, the Contractor shall submit full particulars of all claims for direct loss or expense under clause 44.1 together with all supporting documents, vouchers, explanations and calculations which may be necessary to enable the direct loss or expense to be ascertained
H by the S.O. **The amount of such direct loss or expense ascertained by the S.O. shall be added to the Contract Sum.** (emphasis added)

[78] Clause 44 to the PWD 203A Standard Form of Contract signed by the parties provides as follows:

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44. Loss and Expense Caused by Delays

If the regular progress of the Works or any part thereof has been materially affected by reason as stated under Clause 43 (c), (f) or (i) hereof (and no other), and the Contractor has incurred direct loss and/or expense for which he would not be reimbursed by a payment made under any other provision in this Contract, then the *Contractor shall within one (1) month of the occurrence of such event of circumstance give notice in writing to the S.O. of his intention to claim for such direct loss or expense* together with an estimate of the amount of such loss and/or expense, subject always to Clause 48 hereof. (emphasis added)

[79] Finally cl. 48(a) of the PWD 203A Standard Form of Contract provides as follows:

So soon as is practicable but not later than three (3) months after practical completion of the Works, the Contractor shall submit full particulars of all claims made by him under Clause 5(d) and/or 44 together with any documents, supporting vouchers and any explanation and calculations including documents relating to the accounts of Nominated Sub-contractors or Nominated Suppliers, which may be necessary to enable the Final Account to be prepared by the S.O. provided always the Contractor had given the notice of claim in writing within the stipulated time or times in the said provisions.

[80] The learned authors Lam Wai Loon and Ivan Y F Loo of *Construction Adjudication in Malaysia*, CCH a Wolters Kluwer Business, drew support for the proposition that a claim for losses incurred as a result of extension of time is claimable under a payment claim from the New Zealand Court of Appeal decision in *George Developments Ltd v. Canam Construction Ltd* [2006] 1 NZLR 177, CA. It was held that so long as such an entitlement is provided for under the written contract between the parties, such a claim can be mounted. I do appreciate that under s. 19 Interpretation of the New Zealand Construction Contracts Act 2002, "payment" means:

(a) a progress payment for construction work carried out under a construction contract; or

(b) another type of payment under construction contract to which a party who has agreed to carry out construction work under the contract is entitled for, or in relation to, construction work carried out by that party under the contract.

[81] In the New Zealand Court of Appeal case of *George Developments Ltd (supra)*, His Lordship Robertson J said at para. 55 of the judgment:

On the inclusion of extension of time costs, we adopt the New South Wales approach. The New South Wales Act is not identical to the Act (as it requires that a payment claim identify the construction work "or related goods and services" to which it relates, in contrast to s. 20(2)(c) of the Act), but we do not think the difference is material in this context. Although the definition of construction work in s. 6 of the Act refers to

physical work, *the force and thrust of the Act cannot be limited to claims for physical work actually done as opposed to costs which inevitably arise from carrying out the work.* This might include insurance costs, interest, costs of preparing a programme or *an extension of time entitlement. As long as the construction contract provides for the payee to be paid the claimed amount in consideration for its performance of construction work* (whether or not entitlement is contingent on a factor such as an extension of time being granted), *the payee is entitled to make a claim for payment in a payment claim.* If the payer's stance is vindicated, the particular amount will not have to be paid, but that will not prejudice the entitlement of the payee to be paid the other amounts claimed in the payment claim or invalidate the payment claim as a whole. (emphasis added)

[82] It is worth noting that the New Zealand Court of Appeal in construing the New Zealand's Construction Contracts Act 2002, with which our CIPAA shares almost identical purpose and objectives, stated the following in the same paragraph:

> **It is not necessary that every amount claimed in the payment claim can be directly linked to a physical task involved in the construction of the building or structure.** The Act was specifically intended to avoid artificial distinctions. **Cash flow was intended to be protected by the Act and it is to be interpreted so as to achieve its object of speeding up payments.** (emphasis added)

[83] The same position was also propounded in the book *Adjudication of Construction Payment Disputes in Malaysia*, LexisNexis, authored by Chow Kok Fong, Lim Chong Fong and Oon Chee Kheng, wherein it is stated that:

> [5.16] The items which are frequently tendered in a payment claim may be conveniently considered under four broad heads:
>
> (1) The first relates to the permanent works. This is the building, facility, structure or system which the contract intends the contractor to construct or install and hand over to the employer on completion.
>
> (2) The second relates to variations which are changes made to the design or the employer requirements. Variations may take the form of an addition or omission of work.
>
> (3) The third component is described as temporary works. These are items of work which are undertaken to enable the permanent works to be carried out and which are intended to be dismantled and removed from the site upon completion of the works. Examples include earth shoring systems and diaphragm walls used during excavations, formwork for the casting of concrete, scaffolding used for finishing work and temporary site buildings to house site personnel and workers while the construction is in progress.

(4) The final category *consists of costs associated with expenses which are necessary for the organising and execution of the works. These items are sometimes referred to as site preliminaries and include items such as insurance, bonds, maintenance of site facilities, wages and utilities.*

…

[5.30] It is clear from this quick survey of the authorities that the widest berth is accorded by the HGCRA…While the position in Australia and New Zealand are more circumscribed, *the thread of judicial comments maintain* quite consistently that the admissibility of a claim is determined by reference to the contract – in effect whether the contractual intention envisages that an item is claimable as part of the contract price or *on some basis derived from or extrapolated from the contract price.* Thus in both New South Wales and New Zealand, it is envisaged that *items for site preliminaries and site overheads will be clearly claimable* where the contract clearly envisages such claims being made as part of the progress payment process.

…

[5.32] In Malaysia, the expression *'loss and expense'* typically *embrace items which fall to be described as site preliminaries.*

…

In these situations … *it is considered that on the authorities in the United Kingdom, Australia and New Zealand* they should *properly form part of a payment claim*. (emphasis added)

[84] I have no problem associating with and adopting the views expressed by the two seminal books on adjudication in Malaysia. Based on the principles enunciated above, there is no good reason why payments pertaining to "loss and expense claims" due to the delay in completion of works cannot come within the ambit of CIPAA. Indeed, "payment" under s. 4 CIPAA means "a payment for work done or services rendered under the express terms of a construction contract." Clauses 44 and 48(a) of the PWD 203A Standard Forms of Contract are the express terms under which the payment claim was made.

[85] I am further fortified in my view having regard to s. 29(4)(c) CIPAA where under s. 29(1) CIPAA a party may suspend performance or reduce the rate of progress or performance of any construction work if the adjudication decision has not been paid wholly or partly after the receipt of the adjudication decision. Under s. 29(4)(c) CIPAA the claimant who has obtained an adjudication decision in his favour is entitled to recover any loss and expenses incurred as a result of the suspension or reduction in the rate of progress of performance from the other party.

[86] Quite obviously the payment claim for this loss and expense is made because the contract is still subsisting and there are further claims due after the suspension of work because of further work done. It also flows naturally from s. 29(4)(b) CIPAA where the party who exercises his right under s. 29(3) CIPAA is entitled to a fair and reasonable extension of time to complete his obligations under the contract.

[87] As this is a case where the adjudicator had erroneously held that he had no jurisdiction under CIPAA to hear the payment claim, this court is at liberty to interfere with the decision made as it is a decision that goes towards jurisdiction. Not to hear a dispute submitted for his adjudication is equally a breach of natural justice for the adjudicator did not hear the parties at all.

[88] As this head of claim in claim no. 4 is severable from claims no. 3 and 4 which had been decided on merits and for which I would not interfere, I may set aside that part of the decision that is affected.

Pronouncement

[89] For the reasons given, I had set aside only the part of the adjudication decision wherein the adjudicator had dismissed claim no. 4 with respect to the "loss and expense claim".

[90] The plaintiff/claimant shall be entitled to re-commence adjudication proceedings on claim no. 4 only from the notice of adjudication dated 25 March 2016 with a new adjudicator to be appointed by the Director of KLRCA.

[91] In view of the peculiar circumstance of this case and the novelty of the issue raised, I had exercised my discretion and made no order as to costs.